to pay to a third party in consequence of the other party's breach of contract. In that case, the third party had already made a claim, but the amount was liable to be increased because of possible claims on the third party by sub-purchasers.

The respondent relied upon *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.*[2] which was followed by the High Court in reserving this head of damages. In that case, Somervell L.J. and Denning L.J. disapproved a declaration of indemnity in respect of a possible claim by a third party who had not at that juncture made a claim. Somervell L.J. pointed out that, when the stage was reached when a precise claim could be made by the plaintiff against the defendant, difficult questions might arise depending on differences in the contracts between plaintiff and defendant as compared with those made between the plaintiff and the third party (a relevant consideration in the present case) and on such questions as the obligation of the third party to mitigate damages. Logic is on the side of the views expressed by Somervell L.J. and Denning L.J. that the issue should be reserved with liberty to apply for directions when the real issues can be determined and damages quantified. The order of the High Court should therefore stand. Presumably, the situation in regard to claims by third parties should soon be clarified once the work to be completed by the appellant has been done.

For the appellant, it was pointed out that there was an order made in these proceedings empowering the sheriff to seize appellant's share in New City Realty Ltd., the purchaser of the balance of the estate, and it was suggested that this order might be discharged if proceedings were concluded by a final judgment. The judge in the High Court considered the question of discharging this order at this stage and his refusal to do so was not challenged on appeal. The existence of this order is not, in these circumstances, a relevant consideration for this court in determining whether the issues in question should be reserved.

I would dismiss this appeal with costs.

Barakbah C.J. (Malaya) and Wee Chong Jin C.J. (Singapore) concurred.

Appeal dismissed.

Solicitors: *Drew & Napier; C. J. Koh & Co.*

ENG KEOCK CHENG v. PUBLIC PROSECUTOR

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) August 25, 1965]

[K.L. — Federal Court Criminal Appeal No. 16 of 1965]

Constitutional Law — Delegation of power — Emergency — Whether Parliament can delegate power to legislate — Federal Constitution, arts. 8 and 150.

Criminal Procedure — Trial without preliminary inquiry and without a jury — Validity of Emergency (Criminal Trials) Regulations, 1964 — Declaration that regulation valid despite inconsistency with any written law — Whether "written law" includes the Constitution — Emergency (Essential Powers) Act, 1964 — Criminal Procedure Code (Cap. 6), ss. 138 and 200.

Legislation — Emergency — Delegated legislation — Validity of.

The appellant had been convicted for offences under section 57(1)(a) and (b) of the Internal Security Act, 1960, and sentenced to death. On appeal it was argued (1) that the trial court had no jurisdiction to try the offences of which the appellant was charged and convicted by reason *inter alia* of (a) the absence of any preliminary inquiry as required by section 138 of the Criminal Procedure Code; (b) the absence of a jury as required by section 200 of the said Code, (2) that the procedure adopted by the learned trial judge for the trial was a procedure appearing in the Schedule of the Emergency (Criminal Trials) Regulations, 1964, being seemingly the procedure referred to in regulation 4 thereof, which regulation 4 in so far as it purports to authorise any one of the many deputy public prosecutors to deprive a man charged with a capital offence of the protection of a preliminary inquiry and of a jury is *ultra vires*.

It was argued for the appellant that although it was recited in the Emergency (Essential Powers) Act, 1964, that any regulation made under it shall have effect notwithstanding anything inconsistent therewith contained in any written law other than the Act, this did not authorize the making of regulations inconsistent with the Constitution as in the circumstances the words "written law" in the Act could not include the Constitution. Alternatively it was argued that Parliament had exceeded its powers by purporting to delegate to the Yang di-Pertuan Agong power to enact regulations inconsistent with the Constitution.

Held: (1) the true effect of article 150 of the Federal Constitution is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved; and that this necessarily included authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution;

(2) the provisions of the Emergency (Essential Powers) Act, 1964, are not beyond the power of Parliament to enact and as Parliament has expressly enacted that regulations made under the Act are to be valid notwithstanding any inconsistency with the provisions of the Constitution, such regulations cannot be challenged on the ground of any such alleged inconsistency;

(3) on the facts the appellant was rightly convicted and therefore the appeal must be dismissed.

FEDERAL COURT.

Dato' David Marshall for the appellant.

B. T. H. Lee (Senior Federal Council) for the respondent.

Wylie C.J. (Borneo): This appellant was convicted in the High Court in Malaya at Johore Bahru of one offence under section 57(1)(a), and of another offence under section 57(1)(b), of the Internal Security Act, 1960. He was sentenced to death in respect of each charge. On appeal, certain grounds of law were argued which go to the jurisdiction of the court and the validity of the procedure adopted at the trial and it is convenient to consider these grounds before detailing the circumstances of the alleged offences.

The two grounds referred to can be considered together and, as set out in the petition of appeal, read as follows:—

"1. The trial court had no jurisdiction to try the offences of which the appellant was charged and convicted by reason, *inter alia* of —

(a) the absence of any preliminary inquiry as required by section 138 of the Criminal Procedure Code;

(b) the absence of a jury as required by section 200(i) of the said Code.

2. The procedure adopted by the learned trial judge for the trial was a procedure appearing in the schedule of the Emergency (Criminal Trials) Regulations 1964, being seemingly the procedure referred to in regulation 4 thereof, which said regulation 4 in so far as it purports to authorise any one of the many Deputy Public Prosecutors to deprive a person charged with a capital offence of the protection of a preliminary inquiry and of a jury is *ultra vires*."

These grounds attack the validity of regulations 4 and 5 of the Emergency (Criminal Trials) Regulations, 1964, which are in these terms:—

"4. Where a person is charged with any offence against any written law (whether committed before or after the commencement of these Regulations) and the Public Prosecutor certifies in writing that the case is a proper one for trial under these Regulations, such case shall not be tried by a jury or by a judge with the aid of assessors but shall be tried by a judge without the aid of assessors and disposed of in accordance with the provisions of these Regulations.

5. (1) No preliminary inquiry shall be held in respect of an emergency procedure case, but the magistrate before whom the accused person is brought shall, upon production of the certificate referred to in regulation 4 and whether or not a preliminary inquiry has already been commenced, forthwith commit the accused for trial by a judge at such place (whether within the same State or not) and upon such charge as may be preferred by the Public Prosecutor.

(2) The Public Prosecutor may, in any emergency procedure case, at any time before trial, alter or amend the charge or charges against the accused or prefer an additional charge or additional charges against him."

The submissions in support of these grounds can be briefly summarised as follows. It was submitted that the authority under which these regulations were made did not, and could not, authorise regulations which were inconsistent with provisions of the Constitution and these regulations did infringe article 8 of the Constitution which declares that all persons are equal before the law and entitled to the equal protection of the law. In order to understand these submissions, it is necessary to refer first to certain constitutional provisions and other enactments to show the course of events and the authority under which these regulations were purported to be made.

They were made in exercise of powers conferred by section 2 of the Emergency (Essential Powers) Act, 1964. The long title and recitals to that Act are to the following effect:—

"An Act to confer certain powers on the Yang di-Pertuan Agong which it is expedient that His Majesty should be enabled to exercise in the emergency proclaimed on the third day of September, 1964, under article 150 of the Federal Constitution.

Whereas by reason of the existence of a grave emergency threatening the security of the Federation, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong under article 150 of the Constitution:

And whereas Parliament by reason of the emergency considers it necessary for securing public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community, that powers be conferred on the Yang di-Pertuan Agong to make such regulations as appear to him to be necessary:

And whereas it is hereby declared that this Act appears to Parliament to be required by reason of the emergency:".

The enacting clause recites that the Act is enacted —

"pursuant to Clause (6) of article 150 of the Federal Constitution."

That clause is as follows:—

"Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution."

The regulations in question are made under section 2 of the Emergency (Essential Powers) Act, 1964, and subsection (4) of that section provides:—

"An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any written law other than this Act or in any instrument having effect by virtue of any written law other than this Act."

It was argued first that the expression "written law" in this subsection does not include the Constitution, notwithstanding that paragraph (97) of section 2(1) of the Interpretation and General Clauses Ordinance, 1948, which defines the meaning of "written law" for the purposes of an enactment such as this Act, after setting out various instances of written laws concludes with the words —

"and includes the Federal Constitution".

It was stressed that section 2(1) provides

that the statutory definitions are to be given the prescribed meanings, —

"unless there is something in the subject or context inconsistent with such construction."

In this connection, it was emphasized that subsection (4) provides that a regulation is to prevail notwithstanding inconsistency with "any written law other than this Act". It was submitted that it would not be reasonable to assume that Parliament intended that a regulation which it was provided must not be inconsistent with a certain Act of Parliament, may nevertheless be inconsistent with the Constitution itself. It was submitted that therefore the subject or context should be held to be inconsistent with a construction which included the Constitution in the expression "written law".

As against that view, it is to be observed that Parliament, while using the expression "written law", has adverted to the question of exceptions and has limited the exceptions to the Act itself. Moreover, so far as the subject is concerned, it cannot be overlooked that the Act specifically sets out that it is made under clause (6) of article 150, which expressly provides for legislation that may override the provisions of the Constitution. In these circumstances, there is not, in the judgment of this court, anything in the subject or context inconsistent with the construction provided for in paragraph (97).

In the alternative, it was argued that, if the expression "written law" in subsection (4) did include the Constitution, then Parliament had exceeded its powers by purporting to delegate to a subordinate authority power to enact regulations inconsistent with the Constitution. This argument appeared in part to be based on the principle *delegatus non potest delegare*. This implies that powers to legislate given to Parliament under the Malaysian Constitution are delegated powers. Parliament is, however, the supreme legislative body under the Malaysian Constitution. Its legislative authority, although restricted in some respects because of federal and other aspects of the Malaysian Constitution, is not delegated to it by some superior authority, but is permanently "vested" in Parliament — to use the expression set out in article 44 of the Constitution. No part of an Act of Parliament can be said to be delegated legislation merely because Parliament in enacting that part is exercising not only its general power to legislate, but its power to legislate to a particular effect. From whom has the power been delegated? It is relevant to observe that the only authority having power to amend the Constitution is Parliament itself. From no point of view can Parliament be said to be exercising a delegated power when it exercises its power to legislate by Act of Parliament given to it under the Constitution, not even when it is exercising a power to amend the Constitution, or to provide contrary to provisions of the Constitution.

If this argument is based not on the principle *delegatus non potest delegare* but on the argument that Malaysia has a written Constitution vesting legislative power in Parliament and that therefore it may be contrary to the provisions of the Constitution for Parliament to enact a law which purports to vest any part of that legislative power in any other authority, then the answer to that argument in this case is to be found in clause (6) of article 150. This Act having been declared to be required by reason of the emergency, none of its provisions can be held invalid on account of the effect of any provision in that written Constitution.

The court was referred to a number of Indian cases dealing with the question of excessive delegation of the legislative function under a written Constitution which confers authority to exercise that function on a legislature established under that Constitution. It does not appear that, in any of the cases cited, the legislation that was challenged, was enacted pursuant to a power such as that conferred by clause (6) of article 150. If the legislation is enacted under a power which gives it validity notwithstanding any inconsistency with the Constitution, it becomes unnecessary to consider whether the legislation would, apart from the exercise of that power, be inconsistent with any part of that Constitution. Consequently, these authorities do not assist in determining the fundamental issue involved in considering this part of the argument.

The true effect of article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution.

It was further argued that the Act was so wide in its terms as to amount to an abrogation by Parliament of its powers to legislate. The Act is in terms which are not uncommon these days when it is desired to exercise special powers because what has become known as an emergency has arisen. The Act is really an enabling Act authorising His Majesty to make regulations. The authority given in subsection (1) of section 2 is to make —

"any regulations whatsoever (in this Act referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life

of the community."

Subsection (2) authorises regulations on certain topics which are very wide in their scope and include —

"special provisions in respect of procedure.....in civil and criminal cases."

However, the power is limited to making regulations on these topics only so far as appears to His Majesty to be necessary or expedient for the purposes set out in subsection (1) which I have already quoted.

However wide this field may be, it is not all embracing and the Act does set out the policy and scope within which the power is to be exercised. It cannot be said to be an abrogation by Parliament of all its power to legislate. Parliament still retains its power to legislate, even within this very field. Indeed, the powers are conferred only for a limited period — during the continuance of the Proclamation of Emergency — and that period can be terminated at any time by a resolution passed by both Houses of Parliament annulling the Proclamation. From the constitutional point of view, therefore, it cannot be seriously suggested that this legislation is unconstitutional as amounting to an abrogation by Parliament of its power to legislate.

This court is of opinion, therefore, that the provisions of the Emergency (Essential Powers) Act, 1964, are not beyond the power of Parliament to enact on the grounds advanced in argument in this appeal.

The Emergency (Criminal Trials) Regulations, 1964, have been made under section 2 of the Act. Their subject-matter is clearly within the language already quoted, as they provide for special provisions in respect of procedure in criminal cases. On this subject, His Majesty has been given power to make such regulations as he deems necessary or expedient for the purposes set out in section 2, and, as has earlier been concluded, the effect of subsection (4) is that this power cannot be limited by reference to the provisions of the Constitution. Parliament has expressly enacted that the regulations are to be valid notwithstanding any inconsistency with the provisions of the Constitution, an enactment which it was not beyond the power of Parliament to make.

It is therefore unnecessary to express any opinion as to whether the regulations are inconsistent with article 8, or any other provision in the Constitution, and it follows that this appeal cannot succeed on grounds 1 or 2 quoted at the beginning of this judgment.

The other grounds argued all involve consideration of the facts of this case. The evidence showed that, on 18th August, 1964, a police force, acting on information received, approached a house in the Benut area of the Pontian coast of Johore, where there were believed to be Indonesian infiltrators. The police challenged. One member of the force, who was about fifty yards from the house, saw a person carrying a firearm which looked to the witness like a rifle. He saw this person as the latter jumped from the front door of the house. The witness fired at this person, who disappeared from his view. Another member of the force saw a person jump down from the kitchen door and that person appeared to this witness to be carrying a sten gun. The witness fired at this person, but lost sight of him.

The assistant superintendent of police in charge of the party which was engaged in the actual action, approached the house after the firing had stopped. He first saw a dead Indonesian dressed in khaki military uniform. The body was in a drain about ten yards from the house. Near it was a light machine-gun. About ten yards away, he saw the appellant, similarly dressed and wounded. He wore a cloth head-gear on which was a star. He was lying flat on his back and holding a sten gun which was lying on his chest. He had four sten gun magazines tied round his waist and loaded with 99 rounds of 9 mm. ammunition which can be used for a sten gun. He also had a hand grenade. The two charges of which appellant has been convicted relate one to possession of this sten gun and the other to possession of this ammunition and the hand grenade. A compass and seventy dollars in Malayan currency were also found on the appellant.

On 24th August, 1964, appellant gave a statement after being cautioned. This was admitted in evidence at the trial after its admissibility had been challenged. Its admissibility has not been challenged on appeal.

In this statement, he describes a journey he made to Indonesia in these terms:—

"I left for Silat Panjang in Indonesia from Klang sometime in the beginning of July i.e. for about 1½ months ago. I was asked by one Chong Meng who is from Selangor, who asked me to accompany him to Silat Panjang. At that time I was doing import and export of rubber on my own. I came to know that Chong Meng through an Indonesian named Ah Leng from Belawan, Indonesia.

When we arrived in Silat Panjang, I asked Chong Meng to show me the goods which I wanted to purchase and Chong Meng said that I had to wait until the following day. I was then in his friend's house for 2 days and on the 3rd day I was arrested by the police and detained. I was questioned for my reason for visiting Silat Panjang."

He said he was taken to a nearby island and there he underwent training with firearms until his return to Malaya. He said he was compelled to join in the training. On 16th August, he was asked to accompany four Indonesians on a sea patrol. At about 11.30 p.m.

the party changed to a small sampan. The statement then proceeds —

"The Indonesian in charge of our party then asked me to guide the party to land at Pontian Besar. We landed in Pontian Besar at about 4.00 a.m. on 17/8/64.

We were all armed. I was given a sten gun, one hand grenade & 4 magazines with 25 rds. in each magazine. I was also given Malaysian currency $100. This was handed to me by the Indonesian who was shot dead. The other four Indonesians in our party were each armed with a machine gun & about one/two hand grenades each. I do not know how much ammunition they were carrying. None of us had any small arms.

I do not know any of their names. We brought along with us 2 days ration only. When we landed in Pontian, I was asked by the Indonesian (decd.) to lead the party to get some food and we decided to break into two gangs to look for food. After I had walked with the Indonesian (decd.) for about 1 hour towards the direction B/Pahat, and while walking along a kampong path, we saw about 10 military personnels about 150 yards. When they saw us we stood down. I was asked to open fire as he had done so. I refused to do so and this Indonesian then ran away from me and when I stood up to surrender my companion then shot me on my back. He was then shot down by the military."

In his evidence given at the trial, the appellant gave evidence that varied greatly from this statement. He said in effect that he was tricked into setting out with others on a business journey to Pulau Ketam, i.e. not to Indonesia at all, and when he enquired why the journey was taking so long, one of the party produced a revolver or pistol and told "me to follow what he said." The party then proceeded to Silat Panjang. Next morning, two of the party were missing and at 8 a.m. police came and arrested him. He was then detained in the police station for four or five days and, after that, confined to a room for a month, being allowed out only to take his bath. For five days before returning to Malaya, he was given exercise and taught to fire a sten gun. As for possession of the gun and ammunition, he states that, during the firing incident, he was on the ground outside the house. The Indonesian who was shot, threw the sten gun and a belt of ammunition to him from the house. He did not pick up the sten gun. He told a most improbable story about the Indonesian spending his time trying to force appellant to fight while firing by the police was actually going on. Finally, the Indonesian shot him.

This account, which was obviously an attempt to raise duress, was dismissed by the trial judge as lies, and he found that the appellant had come to this country carrying the sten gun and magazines, which was what the appellant had said in his statement. The rejection of the account given in evidence has not been challenged on appeal and a ground of appeal relating to duress was abandoned at the hearing. In any event, section 69 of the Internal Security Act, 1960, precludes duress as a defence to the charges of which the appellant was convicted.

With one exception, the remaining grounds of appeal related to questions of credibility, based on minor inconsistencies in the evidence, and to questions of inferences more favourable to the appellant, which might have been drawn. However, bearing in mind that the issue the judge had to determine was whether appellant had possession of the sten gun and the ammunition, with the evidence in the state already detailed in this judgment there was overwhelming evidence of possession, based principally on the evidence contained in the appellant's own statement plus the evidence of the assistant superintendent of police and supported by the evidence of the constable who saw a man jump out of the house apparently carrying a sten gun. There were no inconsistencies or possible inferences in the rest of the evidence that would justify a Court of Appeal in interfering with a finding of possession in the face of evidence so strong.

The remaining ground of appeal raises misdirection in respect of the issues of onus and quantum of proof required of the prosecution and the appellant respectively. There is nothing in the judgment to suggest that the judge did misdirect himself on these issues. The evidence was such that once the evidence of the police witnesses was accepted, corroborated as it was by the appellant's own statement, obviously no failure of a judge, trying these charges alone, to refer to these principles in reasons for judgment written after he had found the appellant guilty, can raise any suggestion of miscarriage of justice when the evidence of possession was overwhelming.

For these reasons, this appeal is dismissed and the convictions and sentences confirmed.

Appeal dismissed.

Solicitors: *Abdullah A. Rahman & Co.*

RE IJOT BINTI BELIKU

[O.C.J. (Lee Hun Hoe J.) August 26, 1965]

[Sibu — Civil Application No. 1 of 1965]

Certiorari — Application to quash decision of Probate Officer — Want of jurisdiction.

This was an application by the applicant for an order of *certiorari* to quash the decision of the probate officer ordering that the estate of Beliku bin Lameng, deceased, be equally divided between the applicant and Suhaili bin Haji Drahman. Letters of administration to the estate of the deceased had been granted to the applicant. There was a dispute between the applicant and Suhaili as to their rights in the deceased's estate and the probate officer purported to hold an inquiry into their rights as a result of which he ordered the estate to be equally divided between them.

Held: the probate officer had exceeded his jurisdiction in purporting to hold the inquiry and to order the division of the estate and therefore his order must be quashed.